



Episode 31 - Transcript

Neurodiversity and litigation - recognising and advising clients

Intro

With communication issues the leading cause of claims against lawyers, it is worthwhile spending some time thinking about how to communicate more effectively. Host Julian Morrow and Barrister Ian Duane discussed the particular challenges of communicating with neurodiverse clients and some practical ways you can improve your awareness of and meet different communication styles.

Julian: Welcome to Risk on Air, I'm Julian Morrow. Today we're discussing communication with neurodiverse clients in litigation. The Australian sociologist, Judy Singer is widely credited with coining the term neurodiversity. It was in her undergraduate honours thesis in 1990. Today, the neurodiversity movement aims to achieve greater acceptance of neurological differences, whether or not those differences are perceived to be a disability, and advocating for the complete inclusion of, and respect for neurodiverse people. To discuss the issue of communication with neurodiverse clients, we're joined by Barrister Ian Duane. Ian, welcome to Risk on Air.

Ian: Thanks very much.

Julian: Neurodiversity is, I think intentionally a very broad term, Ian, and in the same way that we now refer to the autism spectrum, neurodiversity encompasses the huge range of different ways that different brains and different people function. Could you give us a sense of what that range is in terms of neurodiversity and I suppose what the implications of that are for lawyers?

Ian: I think you've captured it perfectly by saying it's a huge range. It's the range of humanity itself, so people just think differently. Some people can be very literal, some people can be very abstract, some people can have an enormous intellect, some people may have less academic skills. So really it's the diversity of human intellect and perspective and reasoning.

Julian: And it encompasses a range of situations, some of which are sort of diagnosed medical conditions, others of which might be acquired. What sort of conditions and situations are we talking about, Ian?

Episode 31 - Transcript

Neurodiversity and litigation - recognising and advising clients

- Ian:** So, I think originally the movement was championed to better understand and represent people who are autistic, but ADHD, people with learning disorders, those with cognitive difficulties; so that could include acquired cognitive difficulties. And I think it's recognised as extending to people with mental health difficulties or intellectual disabilities.
- Julian:** And I suppose no matter where on that range of situations a person who you're dealing with might be, and indeed with all clients, probably all people, communication is absolutely essential.
- Ian:** The bedrock really of what we do as lawyers is communicating, representing, and obviously you need to understand and have understood your client and your advice in the context of proceedings.
- Julian:** And Lawcover tells us that communication is the highest cause of negligence claims against solicitors. So it's not just a nicety, it's got real-world practical ramifications.
- Ian:** Yes, well, we don't want to be there, so it's a good incentive to remember the importance of communication.
- Julian:** What can and should lawyers do to better communicate with and represent neurodiverse clients, Ian?
- Ian:** The starting point is just to recognise how diverse they are and to perhaps not have preconceptions, whether they're negative or positive. So to really get an understanding of who is this person, how do they communicate, what factors are their strengths and what are their weaknesses and how's that going to affect what I have to do in terms of my practice?
- Julian:** So, that's really an issue, which I suppose presents itself on the very first occasion; from the first time you meet a client. Let's work our way through the course of litigation and maybe delve into some of the more tricky areas. I suppose one aspect of it, and not to say that this is something which arises in all cases of neurodiversity, but presumably, there will be times where a lawyer will have to make an assessment about capacity.
- Ian:** Well, that's right. I think your first conference is that really great opportunity to sit back and really listen. You might need to encourage a little bit so, you know, provide opportunities for the person to communicate with you and tell you why they're there, and what they're seeking, and what they're hoping to achieve. So the first conference is a really good opportunity to pick up some clues about what are the factors that relate to this person. And in more extreme cases, they could be as significant as, "Does the person have the capacity to initiate the proceedings?" "Do they have the capacity to enter into a retainer?", which is obviously an important thing for lawyers, and "Will they need a case guardian in some proceedings?" So that first interview can sometimes be either them telling you directly or you surmising that there may be some issues that need some further investigation.

Episode 31 - Transcript

Neurodiversity and litigation - recognising and advising clients

- Julian:** And it's interesting that you say either telling you directly or surmising, there's real subtlety and complexity there, isn't there? Because neurodiversity advocates have written about this. Many neurodiverse people may mask their atypical traits; some people are more comfortable disclosing their neurodiversity than others, and individual decisions in that are perfectly legitimate, but it's something that lawyers at first meeting really need to be aware of
- Ian:** Absolutely. Well, I think there are a lot of lawyers, engineers, doctors who are neurodiverse, and so it really...There isn't one thing that's going to come in and like a label that sits, flashes above their head to tell you exactly what the implications are. And of course, people have a right to dignity and self-determination and to be heard properly, so these are important issues. How can we respectfully explore and consider what needs to be done in each particular case?
- Julian:** Can you give us some examples, Ian, of whether it's capacity-affecting situations or not, just the sorts of different practices that could work for certain clients or that you've found that work and some of the range of those options?
- Ian:** Yes. Obviously, trying to format a way of best getting the most out of your professional relationship; so for example, in some cases that might be a home visit, so somebody's going to communicate with you much better and you might get a better sense of what the issues are for them in a home environment. It really is so diverse depending on the person at hand, but...
- Julian:** I suppose sensory issues can come into it as well, can't they?
- Ian:** Absolutely. So for example, a quiet environment that doesn't have lots of noises coming at people unexpectedly could be quite important for people with sensory issues. Having a fidget device can be quite useful aid to communication. So just letting people be comfortable in the context of their conferences with you.
- Julian:** I think we live in a time where people are increasingly aware of and maybe even sensitive to the language that's used. How can lawyers go about trying to navigate that territory in a way that's going to not compromise what they need to discuss with their clients, but also make those discussions work for people?
- Ian:** Again, it's depending on the person, but for example, we all sit on a range in terms of our gifts, our strengths, our weaknesses. So some people are more literal and for them, you need to be quite aware of not using subjective or metaphorical language. We just need to understand that they're going to communicate with you in a more literal fashion. So, that's just an example of language, obviously respectful language. So, in any client relationship, you want people to be comfortable enough to actually give you the information that you need to practice. So that's just trying to figure out some nice comfortable language for the client. So how would they like, for example, if they recognise themselves as neurodiverse, how would they like that to be referred to? So for some people, they would like to say that they were an autistic person, so that might be how you would use it rather than they suffer from autism, for example. So you can have this sort of negative language which could make people uncomfortable or you could have an inquiry about language that makes someone more comfortable.

Episode 31 - Transcript

Neurodiversity and litigation - recognising and advising clients

- Julian:** Do you think this is an area Ian, where the importance of collegiality amongst professionals can actually create better outcomes for clients and maybe even a justice system that operates better?
- Ian:** Absolutely, in the main, you'll find that we'll very often have some optimal outcomes if you communicate with your opponent about the nature of the issues. Now, everybody wants to achieve best practice if they can, or most people, some people don't have the motivation, but the vast majority of us really want to do a good job where, and there's an opportunity to do that. In tailoring your litigation process, so my context is a litigation system, so tailoring your litigation process to a neurodiverse client is something that we could all be proud of. So that's your opponent, it's the judge, it's the court staff, so there are lots of things that can be done through that collegiate approach to litigation that can get better outcomes for neurodiverse clients.
- Julian:** Yeah, I mean it's probably fair to say litigation doesn't have a reputation amongst the public as a great area of collegiality, and it's true there is conflict involved. Is your sense that courts and practitioners are getting better at being sensitive to neurodiversity, even amid conflict that is very hard fought?
- Ian:** I think so. I mean, you want good outcomes for your client. But you're probably not going to get that if there's a sense of unfairness or a sense that the evidence lacks integrity, or there was some trickiness about how things happened. And conversely, your client might get quite good results if they're not the neurodiverse client in showing sensitivity and accommodating in the process as best as possible to get good outcomes.
- Julian:** Let's talk then about some of those sort of hard formalities that do come up in litigation. You've mentioned the possibility of engaging a litigation guardian or those sorts of things. What about evidence? What should lawyers be turning their minds to in terms of best representing neurodiverse clients?
- Ian:** So, I think centrally remembering that neurodiverse clients, just like anybody else would like to be heard. So, they'd like to have some input into the process and they'd like to have as much self-determination as possible. So it's really just looking about at how can you maximise quality proof in their case, and that'll be different things for different people. So for example, I suppose starting from an assumption that, rather than an assumption that someone doesn't have capacity, searching for, the maximising the capacity that they do have. So that might be an assessment about whether or not they are competent to give sworn evidence. So somebody may lose capacity over the course of their life or they may lose and regain capacity, so sort of taking into account that you may need to get a proof of evidence that may be the best evidence you ever get. You may not be able to wait until trial for someone with a degenerative condition. Some other people may not do well under cross-examination or with oral questions. So some people might prefer, it might be better that you had a written process of cross-examination. So obviously giving evidence is both evidence-in-chief and cross-examination, but I guess just thinking about "How can I best maximise proof?". There's lots of other things, of course, look, using your tool belt; so documents, subpoenas, notices to admit other witnesses, they may all be quite important if there are issues with the capacity to give sworn evidence, there's lots of other areas.

Episode 31 - Transcript

Neurodiversity and litigation - recognising and advising clients

Obviously, one needs to be aware in some circumstances about a person's literacy. You probably know Julian, that in life a lot of people don't tell others that they may not have strong literacy, and so an important part for us is to try and gauge when that arises and then in a respectful and dignified way find a solution.

So, you've probably heard of some technological solution; some people you might need to see if they can use a device to help them read documents in the course of your client-solicitor retainer or barrister retainer, you might need to make sure that they've had read out to them the contents of their affidavit and also just in relation to the words that are used. So, obviously, if you draft an affidavit, and you use, the lawyers use their own words; for a neurodiverse client, that might be really dangerous when it comes to answering questions if they're not the client's own words.

Julian: In the cut and thrust of the courtroom, could you give us some reflections on the ways that questions are asked and being alert to the possible differences of understanding between an interrogator and a witness and the ramifications that can have for the court process generally?

Ian: That's a really good question. I think it's really striking with autistic spectrum witnesses. Obviously, we all communicate from a perspective, and with our own biases. So if you have somebody who's very literal in terms of the way that they communicate, you need to be very aware of that so that one doesn't mistake a literal answer for an obstructive answer. So disagreement to a proposition, they just may disagree with the literal proposition that you put to them. So there needs to be some real care in drafting questions that understand the way that the neurodiverse client communicates and to understand their answer and be ready to adjust and accommodate that person so that there's respect shown in the cross-examining process for misunderstandings that can arise through questions and answers.

Julian: In terms of going back to that question of claims against solicitors and how often they relate to problems in communication, what would your recommendations be in terms of systems or procedures? Things that a practitioner might do a little bit differently from the way they do it with other clients in order, not only to protect the best interests and get the best result for the client but also to make sure that, from a future liability perspective, you've done the best to protect yourself as well?

Ian: Really good question and there are lots of things that can be done. So obviously, there's the basics of taking notes and being genuinely inquisitive so that you are alert to the steps that need to be taken; whether that is obtaining a case guardian in more profound or extreme cases or some other step. But it could be something basic like really knowing your brief or your file. So if you have a neurodiverse client, some of them have a great capacity for detailed knowledge of a particular subject, for example, the litigation that they're engaged in. So they might view a lack of careful knowledge and understanding, detailed understanding of the brief, they might see that as a lack of competence. The other things that can be done is just explaining what's coming up, what the process is, what's an offer of settlement, when do cost orders get made. Just because you are telling the truth doesn't mean the fact will be established. So explaining in detail some things that probably we take for granted, but might be more helpful for a neurodiverse client so that there isn't that dissatisfaction leaving the litigation process, which then leads to an inquiry about, well, can I do something about this?

Episode 31 - Transcript

Neurodiversity and litigation - recognising and advising clients

- Julian:** And while this discussion, Ian's been focused on communicating with neurodiverse clients, as you've already recognised, neurodiversity is something that isn't just limited to clients. It's going to be there amongst work colleagues; whether it's solicitors, barristers on the bench, it's everywhere. So it's something that practitioners need to be aware of in their own workplaces even when we're not dealing with clients.
- Ian:** Absolutely. So you, you can't change how somebody else is. You can try and adapt to communicate with each other. So just the same as it's difficult for yourself to change the way that you are in terms of your, now are you literal or are you very flowery metaphorical sort of person? Is it difficult for you to speak without your hands moving? Those are the sorts of things that you just have to adapt, and I suppose dish it up the way that the person, the way it is most effective for that circumstance. So if you had a neurodiverse judge, there are plenty of them, then just present the case in a way that's reflective of the way that judge would like to hear it. I would've thought so, sensible approach, otherwise, there's going to be all sorts of misunderstandings and conflict. So you're right, neurodiversity, it's everywhere. And I think just that sort of the endeavour to be understood and to communicate effectively, which is just so central to what we do. It's really a great opportunity for us as practitioners to show our worth or a lack of when we're communicating with neurodiverse people.
- Julian:** Yeah, so it's a question of being sensitive and aware and also taking it almost as a professional responsibility, to think about accommodations and implementing them and taking some ownership of that.
- Ian:** Absolutely. It's far more rewarding as a professional to feel like you've had a really good communication and you've represented who the person really was or if they've felt they've been heard or respected. These are really central to how we perceive the value of what we do. And the converse of it, of course, is being on the end of litigation because there isn't that feeling.
- Julian:** Ian, thanks very much for speaking with us on Risk on Air.
- Ian:** Thanks very much, Julian.

Outro

Thanks for listening to Risk on Air by Lawcover. Join us for the next episode on current risks in legal practice to stay up to date.